artemis legal

14 April 2020

Policy Reform & Legislation
Department of Communities and Justice
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Dear The Department of Communities and Justice,

Submission: Overturning prior unjust child abuse settlements

We are a New South Wales based law firm that specialises in acting for survivors of child sexual abuse on a national level in relation to compensation claims primarily against institutions that have failed in their duties to those children.

Over the past 20 years we have acted for over 10,000 survivors of crime and over 1,000 survivors of child sexual abuse.

We deal with claims throughout Australia and have had experience with the legislative amendments in relation to prior unjust child abuse settlements in Tasmania, Queensland, Western Australia and Victoria. We have been able to or are in the process of achieving significant results in these jurisdictions in cases where there have been prior deeds and therefore, have been able to assist in providing our clients with a sense of justice.

Below are our submissions, answering the discussion questions put forward in your Discussion Paper on Overturning Prior Unjust Child Abuse Settlements.

1. **Should the courts be given the discretion to set aside settlement agreements in relation to historical child abuse claims?**

In short, yes.

It is in the interests of justice, and therefore a matter of extreme importance that New South Wales courts are given the discretion to set aside settlement agreements in relation to historical child abuse claims. We are aware of current cases in New South Wales where survivors of child sexual abuse have been encouraged to enter into unfair settlement agreements.

2. **Which definition of 'child abuse' should be used in the proposed reforms**

It is our submission that the broadest definition, definition "c" provided in the Discussion Paper should be used. That is, the proposed reforms should apply to child sexual, physical and other connected

abuse. This will allow survivors to have the full benefit of the removal of the limitations in s6A(2) of the *Limitation Act.* It will further provide consistency across the legislation.

3. Should the courts be given the discretion to set aside:

(a) Settlements for claims that were statute barred at the time the settlement was entered into;
(b) Settlements entered into where there was no proper defendant for a claim;
(c) Settlements entered into in other circumstances that might mean the settlement was unjust or unfair.

It is our view that the courts should be given the discretion to set aside all of the above. Further, it is our opinion that Courts should have the discretion to set aside any deed in relation to child sexual, physical and other connected abuse, prior to the commencement of the reforms relating to deeds.

There are a plethora of reasons why a court may consider an earlier deed to be unfair, therefore the legislation ought not to provide an exhaustive list as to how or why deeds may be unfair.

4. Should the courts' discretion be defined by referring to settlement agreements entered into before 1 January 2019? If so, should there be any limitations on this discretion?

The court discretion should not be limited to decisions only entered into before 1 January 2019. As noted above, it is our view that the Court's should have the discretion to set aside any deed which is entered into prior to the suggested reforms.

5. Which test should the legislation provide for the exercise of the court's discretion to set aside a settlement agreement?

The legislation should use the 'just and reasonable' test which is currently used in Queensland, Western Australia and Victoria. As most states are using this test it will provide some consistency and allow judges to look at case law and precedents set in these states. However, we do not believe there is a significant difference between the three tests currently in use across Australia.

6. Should criteria be prescribed that the court must consider in applying the above test? If so, what should these be?

Criteria, similar to that used in Tasmania, should be prescribed to assist the court in determining the appropriate considerations when applying the above test. We suggest the following criteria, we have built upon the Tasmanian criteria and the additional suggested criteria is bolded;

(a) The amount of the agreement

(b) **Whether the claim was assessed on its merits;**

(c) The relative strengths of the bargaining positions of the parties **including whether the plaintiff was legal represented and the extent and quality of that legal representation**; and

(d) Any conduct, by or on behalf of the organisation to which the agreement relates, that

(i) relates to the cause of action; and
(ii) occurred before the settlement was made; and
(iii) the court considers to have been oppressive.

(e) Any other matter the court considers appropriate

The criteria should not be exhaustive.

It is our experience that the above criteria are significant aspects in considering whether previous deeds are just and reasonable. Significantly, it is important for a Court to assess whether the claim was assessed on its merits, as often survivors of abuse were simply paid an arbitrary amount to "go away".

Further, it is of great importance that the legal representation of the plaintiff is assessed. Particularly, whether the claimant was represented throughout the process of evidence collecting, arguments and negotiations. It is also important to assess who provided that legal representation.

We have also found that in some cases, actions by the defendant prior to settlement have impacted our client's understanding of their bargaining position, and profoundly impacted their sense of justice throughout the first settlement process. For example, we have represented clients who during the first settlement process were made to feel like they were trouble-makers or opportunists. This is particularly distressing for survivors of child sexual abuse who have been silenced their whole lives, and often whose psychiatric injuries make them particularly vulnerable to this behaviour.

7. If a settlement agreement entered into in relation to child abuse and other causes of action does not set out the amount paid with respect to child abuse, should the potential reforms specify what portion of the settlement amount is to be taken into account as a payment for child abuse? Alternatively, should this be left to the courts' discretion?

We have never encountered a deed which covers child sexual, physical and other related abuse and additionally another cause of action and therefore we do not have a view on this question.

8. If the courts are given the discretion to set aside a settlement agreement, should they also have the discretion to set aside orders, judgments, and other contracts or agreements (excluding insurance contracts) giving effect to the set aside settlement agreement?

Yes, it would be within the interests of justice to do so.

9. Are there any other issues that stakeholders have identified in relation to the interaction between the potential reforms and the National Redress Scheme

It is our view that the National Redress Scheme is significantly inadequate. We also have grave concerns about survivors of sexual abuse accepting offers from the National Redress Scheme without

proper legal advice and without understanding their civil rights, or the potential worth of their claim if they pursued it civilly.

Further, the cap of $150,000 is grotesquely inadequate, and the assessment schedule gives significant weight to the objective seriousness of the abuse, but not enough weight to the subjective internalisation and impacts of abuse. This means that a survivor of abuse who has significant psychiatric injuries such as post traumatic stress disorder, would only be eligible for a maximum of $50,000 as the abuse they experienced did not include penetration. This is compared to a recent settlement of over $200,000 we achieved for a client who was not penetrated.

It is our view that some National Redress Scheme determinations would be as unjust as some previous settlements, and although it is dismissed in the discussion paper, the reforms should also apply to National Redress Scheme determinations.

10. Should any other categories of settlement be excluded?

It is our strong view that no categories of settlement should be excluded from the reforms. This should be beneficial legislation which is designed to give victims of child sexual abuse some sense of justice, and therefore should aim to open as many doors as possible.

11. Should the potential reforms be limited so that only the person who received payment under a settlement agreement can apply to have the settlement agreement set aside?

Yes, as it is only this person, the survivor, who has a cause of action.

Yours faithfully

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